

R. B. WHITACRE & CO.

FEBRUARY 21, 1910.—Ordered to be printed.

Mr. BRISTOW, from the Committee on Claims, submitted the following

REPORT.

[To accompany S. 6166.]

The Committee on Claims, to whom was referred Senate bill 6166, having considered the same, report said bill favorably with an amendment.

In lines 5 and 6, page 1, in lieu of the words "one thousand and fifty-six dollars" insert the words "nine hundred and forty-two dollars and ninety-seven cents."

As amended your committee recommend its passage.

Senate Report No. 698, Sixtieth Congress, second session, is adopted and made a part of this report, as follows:

[Senate Report No. 698, Sixtieth Congress, second session.]

The Committee on Claims, to which was referred the foregoing bill, having examined the same, report it favorably and recommend its passage without amendment.

MEMORANDUM.

In 1906 the firm of Widell-Finley Company was engaged in the construction of the irrigation project known as the Bellefourche project, in South Dakota. While so engaged, the claimants furnished, among other things, 800 kegs of blasting powder. Upon the failure of the contractors this powder was unpaid for, and the Government had and used 742½ kegs of said powder, as appears from the letter of the acting director, hereto attached. While the contract price for the work amounted to over \$100,000, the bond taken by the Government was only \$21,500. Upon the failure of the contractors the Government continued the work at a cost of about \$65,000, which more than exhausted the bond. The law provides that persons furnishing goods can join in a suit on a bond, but can only participate in the benefits after the charge of the Government has been paid. (See ch. 778 of the Laws of 1905, p. 811, Stat. L. 33, pt. 1.)

Under the rules parties are not furnished information as to the amount of the bond, and therefore naturally rely on the Government taking a sufficient bond.

In further support of the report reference is made to the exhibits hereto attached.

EXHIBIT A.

ST. PAUL, MINN., *November 25, 1907.*

Hon. F. H. NEWALL,

Chief of Bureau of Reclamation, Washington, D. C.

DEAR SIR: We hereby respectfully submit our claim against the United States for \$942.97, with interest from March 26, 1906, at 6 per cent per annum.

This amount is the purchase price and reasonable value of 742½ kegs of blasting powder sold and delivered by us to Widell-Finley Company at Bellefourche, S. Dak., on February 1, 1906, and appropriated and used by the United States in the completion of government work at that point. No part of this claim has been paid.

The facts connected with this claim are as follows:

On January 25, 1906, we contracted with Widell-Finley Company to sell and deliver to them at Bellefourche, S. Dak., 800 kegs of blasting powder for \$1,016 (freight to be added), to be used in the government work at that place, provided for in schedule No. 2, main supply canal, and to be paid for within sixty days from delivery.

Our claim as originally presented to the United States (see letter No. 4, hereto attached) was for \$1,318.61, which covered 800 kegs of powder at \$1,016, freight (paid by Widell-Finley Company), \$264; fuses returned to us, \$38.61.

Previous to our contract for this powder the Widell-Finley Company contracted with the United States to do this work, as we are advised, for \$107,000. (See copy of letter of Mr. R. F. Walter, engineer in charge, of July 17, 1906, marked No. 1.)

These contractors furnished a bond, dated April 26, 1905, for \$21,500 (copy of which is attached, marked No. 2). We have not been able to secure copy of the contract. (See copy of letter attached, marked No. 3, dated December 6, 1906, from the Assistant Secretary of the Interior.)

On February 14, 1906, a petition of certain creditors was filed in the district court of the United States at Mankato, Minn., requesting the appointment of a trustee in bankruptcy of the Widell-Finley Company, which petition was heard, and they were adjudged bankrupts on February 25, 1906, and Henry W. Volk, of Mankato, appointed trustee.

The United States then took charge of the work and took possession of and used 742½ kegs of this powder in prosecuting the work. (See letter of June 19, 1906, of Acting Director of Geological Survey, marked No. 4.)

This work was completed by the Government about September 4, 1907, at a cost in excess of the contract price "in the neighborhood of \$65,000." (See copy of letter of Mr. Walter, dated September 4, 1907, and marked No. 5.)

It is impossible to determine what, if any, dividend will be paid in this bankruptcy proceeding, but it is safe to say that such dividend, if any, will be absorbed in paying the claim of the United States against Widell-Finley Company on account of this contract, the United States being a preferred creditor.

We were advised by letter of the Acting Director of the Geological Survey, dated June 19, 1906 (copy of which is attached, marked No. 4), that persons supplying material in connection with public works are given a "complete remedy" under the terms of the act of Congress entitled "An act for the protection of persons furnishing material and labor in the construction of public works," passed August 13, 1894, and amended February 24, 1905 (32 U. S. Stat., 811).

In this case, however, a bond for only 20 per cent of the contract price was required, although the contract price was entirely inadequate. (See letter of Mr. Walter, dated October 19, 1906, marked No. 6.)

The liability on the bond will be entirely exhausted by the United States as a preferred creditor under this act.

The fact is that Widell-Finley Company at the time of making our contract was insolvent, and must have known that they could not pay for the powder. We are advised by our attorney that if this fact was then known to them we could avoid the sale and take possession of the powder as against everyone but the United States.

We were, however, powerless to proceed against the Government as we might against a private individual to recover the powder, as the United States can not be sued, and we, therefore, permitted the Government to use our powder, expecting to receive pay for it when the claim was properly presented.

On December 13, 1906, we filed our claim with the trustee in bankruptcy, believing that the Government would expect that we reduce the claim by any dividends that might be paid.

As no liens for material or labor can be filed on government property or in connection with government work, the statute before referred to was passed, as we understand it and as it appears to be understood by government officials (see letter No. 4),

to furnish a name by which such claims may be paid in case of default on the part of the contractor.

It seems to us, therefore, clearly the duty of the United States Government to exact a sufficient bond. This they failed to do, taking a bond, as before mentioned, for only 20 per cent of the contract price, which price was, according to Mr. Walter, "much lower than anyone could do the work." (See letter No. 6.)

The act before mentioned, which, according to its terms, is "for the protection of persons furnishing material and labor in the construction of public work," is, of course, entirely ineffectual if the government officials charged with the duty of securing the bond fail to fix an amount sufficiently large to indemnify material men against all contingencies.

Our position and claim for compensation direct from the Government is that the Government used and had the benefit of our powder, and is as much obligated to pay for it as if it contracted directly with us for it.

We also claim the right for compensation on the additional ground that the Government failed to provide a sufficient bond for the benefit of persons supplying material or labor in connection with this work.

Yours, respectfully,

R. B. WHITACRE & Co.

No. 1.

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY, RECLAMATION SERVICE,
Bellevue, S. Dak., July 17, 1906.

MR. A. E. HORN,
Room 914 Pioneer Press Building, St. Paul, Minn.

DEAR SIR: I have your inquiry of July 14, and in answer to the questions therein would state that the amount of contract with the Widell-Finley Company for schedule 2, main supply canal, was \$107,000. The amount paid them to date by the Government is \$57,800. It is impossible to tell what the finishing of the work is going to cost the Government at this time, as the work will not be completed for about three months, but it is certainly going to cost more than the contract price.

Yours, truly,

R. F. WALTER, *Engineer in Charge.*

No. 2.

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY, RECLAMATION SERVICE.

BOND.

Know all men by these presents, that we, The Widell-Finley Company, a corporation duly organized under the laws of the State of Minnesota and doing business in Mankato, county of Blue Earth and State of Minnesota, principal, and Adolph O. Eberhardt and Thomas R. Coughlan, of Mankato, county of Blue Earth and State of Minnesota, and William G. Hoerr and Frederick Kron, of Mankato, county of Blue Earth and State of Minnesota, sureties, are held and firmly bound unto the United States of America in the sum of twenty-one thousand five hundred dollars (\$21,500), lawful money of the United States, for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and assigns, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals and attested by our signatures at Mankato, Minn., this 26th day of April, in the year of our Lord one thousand nine hundred and five (1905).

The nature of this obligation is such that if the said The Widell-Finley Company, its successors and assigns, or any of them, shall and do in all things well and truly observe, perform, fulfill, accomplish, and keep, all and singular, the covenants, conditions, and agreements whatsoever which, on the part of the said principal, its successors, and assigns, are, or ought to be, observed, performed, fulfilled, accomplished, and kept, comprised, or mentioned in certain articles of agreement bearing date the 26th day of April, one thousand nine hundred and five, between the said principal and E. A. Hitchcock, Secretary of the Interior, concerning the construction and

completion of the work provided in schedule 2, main supply canal, Bellefourche project, South Dakota, according to the true intent and meaning of said articles of agreement, and shall promptly make payment to all persons supplying labor and materials for the prosecution of the work provided for, then the above obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof the said principal and sureties have hereunto subscribed their hands and affixed their seals the day and year first above written.

Signed, sealed, and delivered in the presence of—

THE WIDELL-FINLEY COMPANY.

No. 3.

DEPARTMENT OF THE INTERIOR,
Washington, December 6, 1906.

Messrs. R. B. WHITACRE & Co.,
St. Paul Minn.

SIRS: Referring to your request of the 13th ultimo for a certified copy of the contract and bond of the Widell-Finley Company for the construction of schedule 2, main supply canal, Belle Fourche project, South Dakota, you are advised that under the act of February 24, 1905 (33 Stat., 811), a certified copy of said contract and bond can be furnished only after the expiration of six months from the completion and final settlement of the contract, and then only in case suit on the bond shall not have been instituted by the United States.

For your further information herein I inclose copy of a letter of the 28th ultimo from the Acting Director of the Geological Survey reporting upon your request.

Very respectfully,

THOS. RYAN,
First Assistant Secretary.

EXHIBIT B.

No. 4.

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
Washington, D. C., June 19, 1906.

Hon. F. C. STEVENS,
House of Representatives.

SIR: Replying further to your letter of May 16, 1906, regarding the claim of R. B. Whitacre & Co., of St. Paul, Minn., for \$1,318.61, representing the value of 800 kegs of blasting powder furnished by that company to the Widell-Finley Company for their use in connection with the contract of the latter company on the Belle Fourche project, South Dakota, I have to advise you that a statement has just been received from the engineer in charge of the project in regard to the matter.

The contract of the Widell-Finley Company provides that if for any reason the contractors fail to prosecute the work as required under the specifications, the Secretary of the Interior may suspend the contract and take possession of the machinery, material, and animals on the ground, completing the work at the expense of the contractor. The Widell-Finley Company failed to proceed with their work in accordance with the specifications, and the contract was therefore suspended by the Secretary of the Interior, all materials on the ground being taken possession of and used by the Government in the prosecution of the work. Among the material thus taken and used was a quantity of powder, amounting to 742½ kegs.

The engineer states that he does not know by whom this power was furnished the contractors, or whether any of it was furnished by your correspondents. The protection of the interests of the Government makes it impossible for the United States to make direct payment of claims of the nature presented by Messrs. Whitacre & Co. Persons or companies supplying material or labor for use in connection with the construction of public works are given a complete remedy under the terms of the act of August 30, 1894, as amended by the act of February 24, 1905. (32 Stat., 811.)

Very truly, yours,

H. C. RIZER, Acting Director.

No. 5.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Bellefourche, S. Dak., September 4, 1907.

Mr. A. E. HORN,
Pioneer Press Building, St. Paul, Minn.

DEAR SIR: I have to advise that the work on the Widell-Finley job has been completed by the Government; that the cost of the work in excess of the contract price is in the neighborhood of \$65,000. An exact statement of money spent and money due them on the contract and amount due the Government from the Widell-Finley Company is being prepared and will be submitted to the proper authorities within a very short time.

Yours, very truly,

R. F. WALTER,
Engineer in Charge.

No. 6.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Bellefourche, S. Dak., October 19, 1906.

A. E. HORN,
Attorney at Law, 914 Pioneer Press Building, St. Paul, Minn.

DEAR SIR: I have your letter of October 11, inquiring as to the Widell-Finley Company contract on the Bellefourche project, and in reply will state that the work is being carried on by force account by the Government, but on account of the scarcity of labor it has not been completed as soon as we expected. It probably will not be completed before next spring. The scarcity of labor has increased the cost of this a great deal, and as the Widell-Finley Company had a very low price bid, in fact much lower than anyone could do the work, it is very probable that the extra cost will be more than the bond, although the exact figures can not be given until the work is completed.

Very truly, yours,

R. F. WALTER,
Engineer in Charge.

STATE OF MINNESOTA, *County of Blue Earth, ss:*

Gustaf Widell, being duly sworn, deposes and says: That he was a member of the company known as the Widell-Finley Company, which entered into a contract on the 26th day of April, 1905, with E. A. Hitchcock, Secretary of the Interior, concerning the construction of main supply canal, Bellefourche project, South Dakota, the same being an irrigation project; that he has read the annexed letter (marked Exhibit A) bearing date November 25, 1907, addressed to Hon. F. H. Newall, Chief of Bureau of Reclamation, signed by R. B. Whitacre & Co., but does not confirm its allegation as to knowledge of insolvency; that he has also read the annexed letter (marked Exhibit B) signed by H. C. Rizer, acting director, and addressed to Hon. F. C. Stevens, dated June 19, 1906; that said Whitacre & Co. furnished the powder to be used on said work, as set forth in said letter (Exhibit A), and that the powder referred to in said letter (Exhibit B) as taken and used by the Government to the amount of seven hundred forty-two and one-half (742½) kegs was a part of the powder furnished by said Whitacre & Co., to deponent's knowledge.

GUSTAF WIDELL.

Subscribed and sworn to before me this 23d day of November, 1908.

[SEAL.]

A. C. EBERHART,
Notary Public, Blue Earth County, Minn.

My commission expires November 1, 1914.

